FILE COPY

FILED
AUG 1 51969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 32

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. H. RUTTER REX MANUFACTURING CO, INC., et al
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR J. H. RUTTER REX MANUFACTURING COMPANY, INC., Respondent

HENRY J. READ
PETER H. BEER
DANIEL LUND
806 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112
Counsel for Respondent,
J. H. Rutter Rex Manufacturing Company, Inc.

Of Counsel
Montgomery, Barnett, Brown & Read
806 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

INDEX

Page

Question presented 1

Statutes involved 2

Statement of the case 2

Argument

Point I.

The Board inordinately delayed the initiation of compliance proceedings and the steps necessary to conclude this case 6

Point II.

The court of appeals correctly exercised its reviewing authority to adjust the backpay period in order to strike a proper balance between the interests of the Board, the Union and the employer 8

Conclusion 20

Certificate 22

Appendix 23

CITATIONS

Cases: Page

Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, (1956) 8

Deering Milliken v. Johnston, 295 F. 2d 856 (4th Cir. 1961) 18, 19

Gardner v. Panama R. Co., 342 U.S. 29 (1951) 8

International Brotherhood of Operative Potters v. NLRB, 320 F. 2d 757 (D.C. Cir. 1963) 13

J. H. Rutter Rex Manufacturing Company, Inc. 115 NLRB 388 (1956) 2, 3

Lansdale, Adm'x., etc. v. Smith, 106 U.S. 391 (1882) 8

NLRB v. Brown, 380 U.S. 278 (1965) 9, 11

NLRB v. David Buttrick Company, 361 F. 2d 300 (1st Cir. 1966) 11

NLRB v. Electric Vacuum Cleaner Corp., 315 U.S. 685 (1942) 13

NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2d 569 (5th Cir., 1966) 14

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc., 245 F. 2d 594 (5th Cir. 1957) 15

NLRB v. J. H. Rutter Rex Mfg. Co., 305 F. 2d 242 (5th Cir. 1962) 7

CITATIONS (Continued)

Page

NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953) 11

Nabors v. NLRB, 323 F. 2d 686 (5th Cir. 1963) 13, 16

Nathanson v. NLRB, 344 U.S. 25 (1952) 13

Phelps Dodge Corporation v. NLRB, 313 U.S. 177 (1941) 10, 12, 16

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) 10

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 6, 11, 20

Volkswagenwerk v. F.M.C., 390 U.S. 261 (1965) 11

Wallace Corporation v. NLRB, 159 F. 2d 952 (4th Cir., 1947) 16

Statutes:

Administrative Procedure Act, 60 Stat. 237, Section 6(a), 5 U.S.C. (1964 ed.) § 1005(a) 17, 19, 24

Section 10(a), 5 U.S.C. (1964 ed.) §1009(a) 25

Section 10(c), 5 U.S.C. (1964 ed.) § 1009(c) 25

CITATIONS (Continued)

Page

Section 10(e), 5 U.S.C. (1964 ed.) § 1009(e) 18, 19, 20, 26

80 Stat. 385, 5 U.S.C. § 555(b) 17

National Labor Relations Act, as amended, 61 Stat, 136, 73 Stat. 519, Section 8(a)(5), 29 U.S.C. § 158(a)(5) 2

Section 10(c), 29 U.S.C. § 160(c) 12, 23

Section 10(e), 29 U.S.C. § 160(e) 11

Section 10(f), 29 U.S.C. § 160(f) 11, 20, 23

Other authorities:

National Labor Relations Board Rules and Regulations, 29 C.F.R. § 101.13 ..... 8, 14

29 C.F.R. § 101.15 ..... 8, 14, 17

National Labor Relations Board, 1960 Report of General Counsel, 47 LRRM 72 (1960) 8

Legislative History of the Administrative Procedure Act, S. Doc. 248, 79th Cong. 2nd Sess. 17, 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 32

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. H. RUTTER REX MANUFACTURING COMPANY, INC., et al,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR J. H. RUTTER REX MANUFACTURING COMPANY, INC.,
Respondent

MAY IT PLEASE THE COURT:

J. H. Rutter Rex Manufacturing Company, Inc. ("Rutter Rex") submits this brief in support of the opinion of the Court of Appeals for the Fifth Circuit reported at 399 F.2d 356 (1968) (R. 957-973).

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS MAY, UNDER THE JUDICIAL REVIEW PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT AND THE ADMINISTRA-

TIVE PROCEDURE ACT CONSIDER UNREASONABLE AND PREJUDICIAL DELAY BY THE NATIONAL LABOR RELATIONS BOARD IN PROCESSING A BACKPAY PROCEEDING AS THE BASIS FOR MODIFYING THE TERMS OF THE BOARD'S BACKPAY ORDER.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 et seq., (1964 ed), are printed in the Appendix, infra. pp. 23-26.

STATEMENT OF THE CASE

In April, 1954, while company and Union representatives were engaged in collective bargaining, the Amalgamated Clothing Workers of America (the "Union") called a strike at the Rutter Rex plant in New Orleans. The strike lasted one year. In March, 1955, while the strike was still in progress, the Board held a hearing to determine whether Rutter Rex had refused to bargain with the Union in violation of Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). The Board found that a violation had occurred and this finding was affirmed by the court of appeals. *J. H. Rutter Rex Manufacturing Company, Inc.*, 115 NLRB 388 (1956) enf'd 245 F.2d 594 (5th Cir. 1957).[1] The order of the Board which issued on

[1]In an effort to cast the employer in the most unfavorable light, the Board at page 2 of its brief, and the Union at page 4 of its brief, assert that the strike only occurred after the company's refusal to bargain—that this refusal "provoked" the strike. (Union brief, page 4) To the contrary, the Board found the strike to have been economic in origin and *later* converted to an unfair labor practice strike by reason of the company's refusal to bargain *after* the strike began. The Board declined to base its findings on events which occurred during the negotiations preceding the strike. (115 NLRB 388, 390) Thus, contrary to the assertions of the Board and the Union, no unlawful activity on the part

February 13, 1956, directed that Rutter Rex "upon application, offer immediate and full reinstatement to their former or substantially equivalent position to all those employees who went on strike on April 21, 1954 . . ." The order further required the payment of backpay to any applicant not reinstated within five days of application.

On June 10, 1957, the court of appeals enforced the Board's order, stating that the numerous problems inherent in reinstating approximately 600 strikers into the balanced line operation of the Rutter Rex plant should be resolved "in further administrative proceedings before and through the Board or in direct contempt proceedings." *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 245 F.2d 594, 598 (5th Cir. 1957).[2] The Board order which was enforced did not designate the names of the individuals who were entitled to backpay, nor fix specific dates upon which the company's obligation to the individual strikers began. Accordingly, there was a compelling need for prompt administrative action by the Board to clarify the company's obligation.

Thereafter, in September and October 1957, in response to the Board's request, Rutter Rex submitted detailed information relating to its compliance with the Board's order, i.e., the names of the strikers who had been reinstated and the dates of reinstatement. (R. 623-631)

---

of Rutter Rex precipitated the strike. Furthermore, although Rutter Rex was charged with unlawful discrimination regarding the reinstatement of strikers, this charge was withdrawn by the Union with Board approval and, therefore, the claimants in this proceeding were not "discriminatees" under the Act. (R. 825-830, 836, 622)

[2]The court expressly reserved for further proceedings questions such as the voluntary termination of employment by strikers, their unwillingness to return to work, their availability for work, the availability of work at various times considering the balanced line operation of the plant and the calculation of backpay due, if any. (245 F.2d at 598)

On November 7, 1957, counsel for Rutter Rex advised the Board as follows: (R. 632-633, 966)

> "Our client has already complied with some of the provisions of the decree, and is presently engaged in bargaining with the representatives of the Amalgamated Clothing Workers of America. If any instance of a failure to fully comply with the order is brought to your attention, we would appreciate your contacting us promptly so that such corrective measures as may be necessary can be immediately taken in order to assure full compliance with the decree."

The Board did not respond to this letter. Although it is incumbent upon the Board to obtain voluntary compliance with its orders where possible, particularly in matters involving backpay, the Board made no effort to obtain voluntary compliance or to cooperate with Rutter Rex in solving the complex problems involved in the reinstatement program. The Board delayed until November 4, 1961 and on that date filed a backpay specification asserting a claim which, as of June 30, 1961, amounted to $342,000 (R. 316-587), and which continued to increase each day thereafter.

The court of appeals found that during the years following its 1957 opinion, "nothing of any consequence was said or done until March 22, 1960." (R. 967) On the latter date Board Compliance Examiner Immel wrote to the company advising that the case had been assigned to him "for the purpose of assisting the Company in complying with the Order of the Board as enforced by the Circuit Court." Immel requested access to company payroll, personnel and social security records "necessary to analyze the amounts of backpay due and

ıe rights of employment of strikers," a task which at ıat time he considered "a formidable undertaking."[3]

he Compliance Examiner added (R. 634-635):

> "We are, we realize, in the position of having delayed action in this matter over a period of several years. Under these circumstances it may seem inconsistent that we now urge that prompt attention be given to the request. However, the delay to date has been in large measure due to a shortage of personnel in this office."

Ultimately, in November 1961, more than four years fter enforcement of the order, the Board finally comıenced a protracted litigation requiring 58 trial days nd involving hundreds of exhibits and 6,573 pages of estimony. On June 2, 1964, the Trial Examiner warded a total of $160,894.69 to 172 claimants (R. 18-15) and on June 3, 1966, the Board affirmed the rial Examiner with minor modifications awarding 159,016.32 to 171 claimants. (R. 3-18)[4]

The court of appeals, concluding on the record that ıe Board had delayed the case unreasonably to the rejudice of the employer, modified the award by termiating Rutter Rex's liability for backpay as of June 0, 1959 and by eliminating ten claimants because their

---

[3]The Board's contact with and interviewing of strikers, taking of statements and affidavits, and review of social security records was not done to a significant degree until late 1960 or early 1961. This is evidenced by the dates appearing on many of the affidavits and the "received" stamp or Social Security Administration entry date on the claimants' authorizations to review social security records. (R 659-732, 743-810). A substantial portion of the information requested by the Board from company records was not requested or obtained until 1961. (R. 834-897)

[4]Since there were over 600 strikers who, according to the Board, were potential claimants, the Board's award to 171 individuals indicates that the Board agreed that the company, acting without the cooperation of the Board in the compliance phase of the case, had compiled with its order in 71.5% of the cases.

claims were not supported by substantial evidence (R. 972).[5]

The court of appeals adjusted the backpay period in the manner it deemed appropriate to "balance . . . the interest of the Board, of the Union, and of the Employer" so that Rutter Rex would not bear the full burden of the Board's delay. (R 969) The Board and the Union here assert that the court of appeals had no right to adjust the backpay period for the reason that any adjustment based upon the Board's delay is tantamount to the application of the doctrine of laches.

ARGUMENT

I.

THE BOARD INORDINATELY DELAYED THE INITIATION OF COMPLIANCE PROCEEDINGS AND THE STEPS NECESSARY TO CONCLUDE THIS CASE.

The court of appeals refused to apply the doctrine of laches even though it found "much factual justification" (R. 966) in the record for the view that the entire backpay specification should be barred. The court found that the Board's delay in initiating compliance proceedings was "inordinate" and "beyond the bounds of reason" (R 969), and dismissed the Board's contention that the delay was due to an extremely heavy case load and lack of personnel, commenting that even though the Board had six attorneys in its New Orleans office, "all of their attention was devoted to other cases, to the complete exclusion of this one", which was "one of the most important, if not the most important, com-

[5] *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

pliance case pending before the Regional Office." (R. 969) The court further found that the Board "let the case slide along in total inaction for almost three years after we granted enforcement — and for five years after the union abandoned the strike." (R. 969)

Although attorneys for the Board admitted to the court of appeals that its delay was inordinate[6] and further admitted in oral argument in December, 1967, that the Board was "red faced" about the delay (Tr. of oral argument p. 58, line 13),[7] the Board now contends that its delay was justified due to its workload and lack of personnel. (Brief of NLRB p. 22) The Board quotes the 1962 affidavit of its Regional Director (R. 902-904) which states that this case "could not have been processed more quickly." (R. 902; Brief of NLRB p. 24) The Board overlooks the fact that for over three years, as found by the Court of Appeals, this case was not "processed" at all. It was allowed to "slide along in total inaction." (R. 969)

The Regional Director's affidavit relied upon by the Board makes no reference to *when* the Board began to compute the backpay allegedly due. Nor does it refer to the fact that the New Orleans Regional Office was commended for its unusually rapid handling of its cases during the period of delay about which Rutter

---

[6]This observation was made by Judge Hutcheson of the Fifth Circuit in his opinion which denied Rutter Rex's request for an injunction against conducting the backpay hearing. *NLRB. v. J. H. Rutter Rex Mfg. Co.*, 305 F.2d 242, 244 (5th Cir. 1962); (R. 969).

[7]Through an apparent error by the printer, this portion of the oral argument was not printed in the Appendix at pages 955-956. At page 58, line 13 of the Transcript of Oral Argument, designated by Rutter-Rex, which immediately follows the portion of the argument printed at page 956 of the Appendix, the Board counsel stated, "The Board can only be red faced about the delay."

Rex complains. (R 947-948)[8] It was admitted by Compliance Officer Jones that in this case the Board made no effort to settle the backpay issue before filing the specification, although the Board's rules and its customary practice require an attempt to obtain voluntary compliance with decrees before litigation is commenced. (R. 642-643; 29 CFR § 101.13, 101.15)

The Board should not now be permitted to deny the delays which it has heretofore admitted and which are clearly demonstrated in the record. The court of appeals was justified in concluding that inordinate and unreasonable delay had occurred.

II.

THE COURT OF APPEALS CORRECTLY EXERCISED ITS REVIEWING AUTHORITY TO ADJUST THE BACKPAY PERIOD IN ORDER TO STRIKE A PROPER BALANCE BETWEEN THE INTERESTS OF THE BOARD, THE UNION, AND THE EMPLOYER.

The Board argues that the court of appeals applied the doctrine of laches "to defeat a public right". (Brief of NLRB p. 9) But the court expressly refused to apply this doctrine (R. 960, 966). The equitable doctrine of laches bars a claim in its entirety if there has been inexcusable delay by the plaintiff in seeking a remedy and the defendant has thereby been prejudiced. *Gardner v. Panama R. Co.*, 342 U.S. 29 (1951); *Czaplicki v. The Heogh Silvercloud*, 351 U.S. 525 (1956); *Lansdale, Adm'x, etc. v. Smith*, 106 U.S. 391

[8]The time required for the Board's case handling generally was considerably shortened during the period 1958-1960, according to the 1960 report of the then General Counsel, Stuart Rothman, reported at 47 LRRM 72 (1960).

(1882). Although the court found in the record "much factual justification" for barring the backpay claim in its entirety (R. 966), the court declined to apply the laches doctrine and dismiss the claims.

Instead the court modified the remedy which the Board devised by requiring that a proper balance "be struck between conflicting interests" (R. 970), citing *NLRB v. Brown*, 380 U.S. 278, 291 (1965). The court recognized that it should not interfere with the reasonable exercise of the Board's discretion (R. 969) and exercised its power to modify only because of the *unreasonable* delay of the Board and the resultant prejudice to Rutter Rex. That which the Board continues to characterize as the court's "laches approach" (Brief of NLRB p. 16), was in fact a discharge of the court of appeals' responsibility, as defined by this Court, to assure the reasonableness and fairness of Labor Board orders. The fact that the Board's delay was a factor which contributed to the court's concern about the fairness of the order does not mean that the court's modification of the order was an application of the doctrine of laches.

The court of appeals discharged its responsibility in a manner consistent with the recent definition of that responsibility by this Court in *NLRB v. Brown*, 380 U.S. 278, 291 (1965), to wit:

> "Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, Sections 10(e), (f), 29 U.S.C. Sections 160 (e), (f)

> (1958 ed.). Courts should be 'slow to overturn an administrative decision,' *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, but they are not left 'to sheer acceptance of the Board's conclusions,' *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co. v. Labor Board*, *post*, at 318."

The National Labor Relations Act does not provide a "rigid scheme of remedies" but entrusts remedial measures largely to the Board's discretion. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945); *Phelps Dodge Corporation, v. NLRB*, 313 U.S. 177 (1941). The Board's discretion in devising remedial orders is not unlimited and not immune from judicial scrutiny, particularly with regard to the reasonableness and fairness of the remedy devised. The judicial review provisions of the Act do not oblige the courts to

rubber-stamp their affirmance of administrative decisions. *NLRB v. Brown, supra; Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1965); *NLRB v. David Buttrick Company*, 361 F.2d 300 (1st Cir. 1966). To the contrary, Section 10(e) and (f) of the Act, 29 USC § 160, (e) (f), specifically invest the reviewing courts with the "power . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

The language of Justice Frankfurter defining the nature of judicial review of Labor Board decisions is relevant here:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds . . . The Board's findings are entitled to respect; but they must nevertheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951).

The Board may not apply a remedy "without regard to circumstances which make its application to a particular situation oppressive . . .". *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953). In this case

the court of appeals found that the application of a mechanical backpay formula was oppressive because of the Board's unreasonable delay, a conclusion which led the court to adjust the Board's order to balance the interests of all concerned.

By the terms of the Act the Board may order the reinstatement of employees "with or without backpay". 29 U.S.C. § 160(c) As this Court stated in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941), "(t)he remedy of backpay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act". The Board's argument in this case proceeds from the unwarranted assumption that backpay is automatically due and "mechanically compelled" and that any reduction of backpay does violence to a vested right. From this assumption the Board concludes that if this right is modified by the court of appeals because of the Board's delay, it must be in reliance upon the doctrine of laches. But the court of appeals did not have to rely upon laches to adjust the amount of backpay awarded by the Board. The court was not concerned with a vested right, compelled by statute. It was only concerned with whether the Board properly exercised its discretion in fashioning a remedy which ignored its own delays and required the company to bear the full financial burden resulting therefrom.[9]

---

[9]The Board argues (Brief of NLRB pp. 19 & 20) that even if its contention regarding laches does not prevail, the action of the Court of Appeals is nonetheless inappropriate on the theory that the Board, in its discretion, *could* have adjusted the backpay award because of its own delay but decided not to do so. It is argued that the Board stated in a previous brief that it would consider the delay factor, that the Board ultimately decided not to modify the award because of the delay factor, and that this is a matter "peculiarly within the Board's discretion". But certainly when the Board sits in judgment of its own derelictions the reviewing court should not be powerless to adjust the result if the Board's action is unreasonable. The Board should not be the sole and final judge of itself.

Although, as the Board points out,[10] the remedy of backpay and reinstatement is designed to vindicate the public policy of the Act, backpay has no relation to public revenues and the Board acts as collection agent for the benefit of private parties. *Nathanson v. NLRB*, 344 U.S. 25 (1952); *International Brotherhood of Operative Potters v. NLRB*, 320 F.2d 757 (D.C. Cir. 1963). A "claim of public right"[11] has not been defeated in this case, but rather upheld, *including* the substantial private interests inherent in the claims of the individual employees.

The court of appeals decision does not conflict with *NLRB v. Electric Vacuum Cleaner Corp.*, 315 U.S. 685 (1942), relied upon by the Board, in which it was held that "nothing in the record would tend to justify us . . . in shortening the period of compensation". (315 U.S. at 698) The justification for shortening the backpay period, not found in *NLRB v. Electric Vacuum Cleaner Corp., was* found in this record. Neither does the court of appeals' decision conflict with *Nabors v. NLRB*, 323 F.2d 686 (5th Cir. 1963), in which the employer, guilty of unlawful discharge of employees, was so recalcitrant in resisting the Board's order that the Board resorted to civil contempt proceedings. The employer pled laches as a *complete bar* to the backpay specification and the Court rejected this defense.

The prejudicial effect of the Board's delay should not have been visited upon Rutter Rex alone. The Board's function is a public one. It was charged with performing its administrative duties with due consideration for the rights of *all* parties. The Board's error

[10]Brief of NLRB p. 14.
[11]Brief of NLRB p. 11.

lies in its failure to consider the prejudice which resulted to Rutter Rex from the delay, compounded by the Board's admitted failure to seek voluntary compliance with the Court's decree as its usual practice and its rules required (R. 642-643; 29 CFR § 101.13, 101.15), even though the company was on record as willing to comply with the Board's order and had sought the Board's assistance to that end. (R. 623-633, 967)

By the time the backpay hearing took place, all that Rutter Rex could do in many cases in an effort to carry the burden of proof placed upon it by *NLRB v. Miami Coco-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966), "was to cross examine the claimants in an effort to establish much of its defenses" (R. 971). The specification is convincing evidence that the Board's delay worked severe hardship on Rutter Rex, to its financial prejudice. By the date of its filing it asserted an accumulated backpay claim of $342,000, and in presenting such defensive evidence as could be marshalled at that late date, Rutter Rex was subjected to the burden and expense of participating in 58 hearing days over a period of ten and one-half months (R. 971; see chronological list R. 1-2). Much of the backpay asserted as due in the specification was not supported by the evidence, and even as to the reduced amount assessed by the Trial Examiner and the Board, the court found that:

> "[t]he proof was often so sketchy that the Trial Examiner had to strain for his findings. Repeatedly, issues were resolved solely by applying the rule as to burden of proof. Ordinarily, we would not take a second look at this, but, after inordinate delay there is occasion for concern. We do not feel that the inordinate delay barred all backpay but some modification must be made." (R. 971)

This case does not turn on "the mere fact of delay", dismissed by the Trial Examiner as unimportant to his conclusions. (R. 56) The court of appeals found evidence of unreasonable delay and evidence of resulting prejudice to the employer. The reviewing court felt that in the belated backpay proceeding it was more difficult for the company to carry the burden of proving its defenses in the individual cases than it would have been had the Board proceeded promptly to a discharge of its responsibilities in the compliance phase of the case. The Board's prompt discussion of the issues with Rutter Rex would certainly have resolved many of the issues, reduced the scope of the specification and greatly reduced the amount of backpay claimed by virtue of an earlier filing of the specification.

The company did not receive the benefit of the Board's usual effort to assist with voluntary compliance although there was room for difference of opinion as to what was required by the order.[12] The specification "second-guessed" the employer by criticizing Rutter Rex for the manner in which it carried out its reinstatement program after the Board failed to lend its cooperation by the customary attempt to arrange voluntary compliance while the reinstatement program was being im-

---

[12]The Court of Appeals recognized the need for interpretation of the Board order in the following language from its enforcing opinion, 245 F.2d at 598:

> "The numerous questions which the Employer insists now plague it, such as the possibility of non-strikers voluntarily terminating employment with subsequent replacement during the strike, the availability of work at various times considering the nature of these manufacturing operations, the number of strikers who may have declared their unwillingness to return to work, the calculation of the lost pay if any, the misconduct of some specified strikers which might afford a basis for denying reinstatement, are not foreclosed. Their resolution can come either in further administrative proceedings before and through the Board or in direct contempt proceedings, if brought before us, for failure to comply with our order decreeing enforcement."

plemented. Against a background of compliance in over 70% of the cases covered by the order, in contrast with the adamant refusal to comply in *Nabors*, supra, the court of appeals stated its concern about the extent and effect of the burden of proof imposed on the company by the Board in cases in which the court felt that the delay of the Board made it more difficult for the company to carry that burden.

The court of appeals found that Rutter Rex had "a legal right to expect the Board to proceed with *reasonable expedition*" (R. 968) to carry out its administrative functions under the Act. The compliance function of the Board in relation to general reinstatement and backpay orders has been defined in *Wallace Corporation v. NLRB*, 159 F.2d 952, (4th Cir. 1947), as follows:

> "Such general orders are analogous to interlocutoy judgments of courts fixing liability but leaving for future determination questions as to amount of liability; and our decrees affirming or enforcing them are analogous to our affirmance of interlocutory judgments on appeal. After the general order of the Board for backpay and reinstatement is affirmed or ordered enforced by us, the *Board must work out the details of reinstatement and of the amounts to be paid as backpay under the general provisions of the order.* This can ordinarily be done by negotiation; but, if controversy arises, the facts must be found by the Board, the body to which Congress has committed the administrative process. *Phelps Dodge Corp. v. NLRB*, 313 US 177." (159 F.2d at p. 954) (respondent's emphasis)

Consistent with the responsibility defined in *Wallace*, the Board's rules state:

> "After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the Regional Office of the respondent's efforts to comply." 29 C.F.R. § 101.15

The Board's compliance officer testified that although he was aware of the letter of November 7, 1957, to the Board stating the company's intention to comply, and although it was customary to contact the employer and try to work out the details of compliance in a voluntary agreement, that practice was not followed in this case, and no effort was made to seek voluntary compliance. (R. 642-643)

The Board has an obligation to act promptly in the compliance phase of a backpay case. The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1005(a) (1964 ed) provides:

> "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives."[13]

This Act was intended as "a comprehensive charter of private liberty and a solemn undertaking of official fairness."[14] The legislative history of the Act reveals what Congress intended:

> "The requirement that agencies proceed 'with reasonable dispatch to conclude any matter pre-

[13]The verbiage of this section of the statute was amended in 1966, 5 U.S.C. § 555(b), but the change in language is not significant in the context of this case.

[14]Legislative History of the Administrative Procedure Act, S. Doc. 248, 79th Cong., 2nd Sess., Forward.

> sented' means that no agency shall in effect deny relief or fail to conclude a case by mere inaction or proceed in a dilatory fashion to the injury of the persons concerned. No agency should permit any person to suffer consequences of unwarranted official delay."[15]

In *Deering Milliken v. Johnson*, 295 F.2d 856 (4th Cir. 1961), the district court predicated an injunction against a Board hearing upon findings that the Board had violated its duty to dispose of the case with reasonable dispatch as required by the Administrative Procedure Act. The court concluded that under Section 10(e) of the Administrative Procedure Act it had the right to impose upon the Labor Board a requirement that it proceed with reasonable dispatch. The court said (p. 868):

> "What is required is some balance between the interest of the Board, of the Union, and of the employer. It should be recognized, on the one hand, that the court should not interfere with any reasonable exercise of the Board's dicretion in controlling the progress of the proceedings pending before it. On the other hand, adequate protection of the employer's rights should be afforded." (295 F.2d at 868)

The Board contends that the Administrative Procedure Act does not support the right of the court of appeals to modify the Award because of the delay which occurred, it being the Board's argument that Section 10(e) of this Act, 5 U.S.C. (1964 ed.) §1009(e), only affords the right to compel an administrative agency to act if it refuses or delays official action.[16] The Board incorrectly interprets the Act and the *Deering Milliken*

[15] Id. at 264.
[16] Brief of NLRB, p. 12.

case. *Deering Milliken* was not a suit to compel agency action but rather to enjoin agency action, to-wit, a hearing ordered by the Board which would have added to the unreasonable delay which had already occurred in the case. The court of appeals in *Deering Milliken* invalidated agency action on the ground of delay. The case does not support the Board's contention that Section 10(e) affords only a basis for compelling agency action rather than modifying or invalidating agency action already taken. In *Deering Milliken* the court of appeals modified a Board order by curtailing the scope of that order. Likewise, in the instant case the court of appeals has modified the scope of an order of the Board.

The verbiage of Section 10(e) on its face refutes the interpretation which the Board places upon the Administrative Procedure Act. Section 10(e)(B)(1) accords the reviewing court the right to hold unlawful and set aside agency action found to be an abuse of discretion. The award of backpay is a discretionary, rather than a mandatory, function of the Board, and the action of the court of appeals in this case is within the authority conferred on a reviewing court by Section 10(e)(B)(1). If the reviewing court has the right to set aside entirely agency action which is an abuse of discretion, it certainly has the right to modify it.

Section 6(a) of the Administrative Procedure Act, which obliges every agency to proceed with dispatch, must be construed with Section 10 which relates to the kind of administrative action reviewable and defines the scope of judicial review. Section 10(a) accords the right of review to "any person suffering legal wrong because of any agency action . . .". Section 10(c) provides that

every final action for which there is no other adequate remedy in any court be subject to judicial review.

The right of the Court of Appeals to modify the order of the Board is therefore supported by dual statutory authority, i.e., Section 10(f) of the National Labor Relations Act, which specifically authorizes the reviewing court to enter a decree "enforcing, modifying, and enforcing as so modified, . . . the order of the Board," and Section 10(e)(B)(1) of the Administrative Procedure Act which vests in the reviewing court the right to hold unlawful and set aside agency action which constitutes an abuse of discretion.

CONCLUSION

The Board's argument would, if successful, establish the principle that under no circumstances may a reviewing court adjust a backpay award because the Board fails to seek voluntary compliance and delays unreasonably in initiating or processing a backpay proceeding. Where the Board issues a general backpay order analogous to an interlocutory decree, and then fails to fulfill its duty in working out the details of compliance, unreasonably delays the filing of the backpay specification, and substantially increases the amount of the claim asserted by the fact of its delay, the court of appeals is acting within its statutory authority when it modifies the amount of backpay awarded in order

to strike a proper balance between the conflicting interests.

Respectfully submitted,

HENRY J. READ
PETER H. BEER
DANIEL LUND
806 National Bank of Commerce Building
New Orleans, Louisiana 70112

Counsel for respondent,
J. H. Rutter-Rex Manufacturing Company, Inc.

Of counsel
MONTGOMERY, BARNETT, BROWN & READ

CERTIFICATE

It is certified that copies of the foregoing brief have been served by mail, upon the following, by depositing the same in a United States mail box, first class airmail postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20570

Jackson & Hess —
Attention Mr. Ralph N. Jackson
1411 Decatur Street
New Orleans, Louisiana 70116

Mr. Jacob Scheinkman
15 Union Square West
New York, New York 10003

Mr. James J. Graham
46 Washington Mews
New York, New York 10003

New Orleans, Louisiana, August 15, 1969

/s/ Peter H. Beer

PETER H. BEER
Counsel for Respondent
J. H. Rutter Rex Manufacturing Company, Inc.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are as follows:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

* * * * *

REVIEW OF FINAL ORDER OF BOARD ON PETITION TO COURT

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals

in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside... Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 *et seq.*, (1964 ed.) are as follows:

ANCILLARY MATTERS

Sec. 6 Except as otherwise provided in this Act—

(a) APPEARANCE.—* * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and

necessity of the parties or their representatives. * * *

* * * * *

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and very final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutoy right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.